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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 286 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME TAX

Versus

SAYAJI IRON WORKS QUARRY P LTD

Appearance:

MR MANISH R BHATT for Petitioner

MR MANISH SHAH for MR JP SHAH for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE K.M.MEHTA

Date of decision: 20/12/1999

ORAL JUDGEMENT (Per Patel, J.)

The Commissioner of Income Tax, Gujarat Central,

Ahmedabad, under section 256 (1) of the Income Tax Act [hereinafter referred to as the Act] moved the Income Tax Appellate Tribunal [hereinafter referred to as the Tribunal] for Reference to this Court by filing Reference Application No. 267/Ahd/1984 for Assessment Year 1975-76 and the Tribunal has referred the following question of law for consideration of this Court :-

"Whether, the decision of the Tribunal in holding that the penalty for late filing of the return is required to be computed on the basis of difference in the first assessment and the assessment on reopening is correct in law?."

2. It transpires from the record placed before us that the Return was duly filed by the Assessee on 30.7.1975 and as observed by the appellate Tribunal there was no delay of a completed month. It transpires that the ITO thereafter reopened the assessment under section 147 and after issuance of notice which was served on the assessee on 27.2.1979, the revised return was filed on 10.10.1979. This resulted in delay of about six months. There was no explanation for the delay. In the paper book, order passed by the ITO imposing penalty is not found, and therefore, the appellate order is required to be referred for this purpose. It is required to be noted that CIT (Appeals) by order dated 20.7.1982, confirmed the order passed by the ITO computing the penalty on the basis of the entire assessed tax right from the time of the first return on the basis of assessed tax. The Tribunal has taken the view earlier in ITA No. 1032/Ahd/1982 that computation of the penalty in a case like this has to be on the difference in the first assessment and the assessment on re-opening and it is the assessed tax on reopening which should be the basis for calculation of the penalty. The assessee filed the return in time and no grievance is made about the delay at the relevant time as the same was filed in time. In our opinion, law requires the ITO to consider section 271 (1)(a) for the purpose of levying the penalty as the assessee without reasonable cause failed to furnish the return of the total income which he was required to furnish under section 148 of the Act.

3. Sec. 271 (1)(a) reads as under:-

"271(1). If the Income Tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person -

(a). has failed to furnish the return of the total income which he was required to furnish under sub-section (1) of section 139 or by notice given under sub-section (2) of section 139 or section 143 has failed to furnish it within the time allowed and in the manner required by sub-section (1) of section 139 or by such notice as the case may be or

(b). xxx xxx xxx xxx xxx
(c). xxx xxx xxx xxx xxx

he may direct that such person shall pay by way of penalty,-

(i). in the cases referred to clause (a)

(a). xxx xxxx xxx xxx
(b). in any other case, in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent of the assessed tax for every month during which the default continued.
(c). xxx xxx xxx xxx

Explanation: In this case 'assessed tax' means tax as reduced by the sum, if any, deducted at source under Chapter XVII-B or paid in advance under Chapter XVII-C.

4. Thus, the assessed tax is to be considered in the manner indicated hereinabove. The Commissioner of Income Tax (Appeals) arrived at a conclusion that delay has tobe reckoned for the return filed in response to the notice under section 148. So far as quantification of penalty is concerned CIT (Appeals) held that the same has tobe calculated with reference to the total tax payable as reduced by the tax deducted at source and the tax paid in advance. However, CIT (Appeals) further held that the assessee gets penalty impliedly even in respect of the tax paid in provisional assessment and regular assessment in the course of original assessment proceedings.

5. In our opinion, Tribunal construing sec. 271 (1) (a) has arrived at a conclusion as to what is "assessed tax", the Tribunal has rightly held that for computation of penalty, the difference in the first assessment and the assessment on reopening is the basis for "assessed

tax".

6. In such case, in addition to the amount of tax if any payable by him, the ITO can collect a sum of 2% of the assessed tax on every month during which the default continued on the assessed tax to be calculated in the aforesaid manner.

7. In view of what is stated above, the answer is in affirmative, in favour of the assessee and against the Revenue.

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